

FEB 18 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Petition of)
)
UNITED STATES CELLULAR CORPORATION)
)
To Delete or Nullify the Effect)
Of Footnote 3 of the Commission's)
Final Order in CC Docket No.)
90-257)

CC Docket No.

94-11

P. 3B.C.

To: The Commission

OPPOSITION TO PETITION

Potosi Company ("Potosi"), by its attorneys, and pursuant to Section 1.45(a) of the Commission's Rules ("Rules"), 47 C.F.R. § 1.45(a), hereby opposes the petition filed by United States Cellular Corporation ("USCC") ^{1/}, a subsidiary of Telephone and Data Systems, Inc. ("TDS") ^{2/}, seeking to delete or nullify the effect of Footnote 3 of the Commission's final order in CC Docket No. 90-257. See La Star Cellular Telephone Co., 7 FCC Rcd 3762, 3767 n. 3 (1992).

I. Introduction

1. Potosi is among the parties that have relied on Footnote 3 to call upon the Commission to afford consolidated consideration to the pattern of misconduct displayed by TDS as a

^{1/} See Petition of United States Cellular Corporation to delete or Nullify the Effect of Footnote 3 (filed Feb. 2, 1992) [hereinafter "Petition"].

^{2/} We will most often refer to TDS and its subsidiaries and affiliates, including USCC, collectively as "TDS". La Star Cellular Telephone Company will be referred to as "La Star". The United States Court of Appeals for the District of Columbia Circuit will be referred to as "the Court" or "the D.C. Circuit". Finally, we will use the short form "Act" for the Communications Act of 1934, as amended.

"minority" participant in cellular ventures. ^{3/} Until now, Potosi stopped short of requesting a consolidated evidentiary inquiry into TDS' qualifications. ^{4/} Now, in light of the lack of candor displayed by TDS in its attack on Footnote 3, an omnibus qualifications hearing appears to be unavoidable.

2. Potosi cannot and will not comment on the question of the candor displayed by TDS in the La Star hearing. However, Potosi has firsthand knowledge of facts that suggest that TDS was substantially less than candid in its current characterization of its involvement in the preparation of La Star's so-called "1988 Interim Operating Authority application." ^{5/}

3. Potosi has discovered memos in its files, dating back to October 23, 1987, of telephone conversations between its principals and H. Donald Nelson and Arthur Belendiuk. As we will discuss, those memos suggest that Mr. Nelson was orchestrating at least some of La Star's efforts in late 1987 and early 1988 to obtain interim authority to operate in St. Tammany Parish, Louisiana.

4. Potosi agrees with TDS only to the extent that it recognizes that "additional evidence" may be necessary to resolve the unanswered questions concerning its character qualifica-

^{3/} See Potosi, Second Supplement, File No. MSD-91-26, at 14-15 (filed Oct. 9, 1992). See also Rochester Telephone Mobile Communications, Inc., Comments, File No. MSD-93-4, at 3 (filed Nov. 12, 1992).

^{4/} See Second Supplement, supra note 3, at 14.

^{5/} See Petition, supra note 1, at 33.

tions. ^{6/} Potosi, however, disagrees that such evidence can be lawfully heard in the La Star proceeding.

5. The fact of the matter is that the Commission is without jurisdiction to delete, nullify or modify Footnote 3, or to otherwise disturb its final order in the La Star case. We turn to the jurisdictional issue first.

II. Argument

A. The Commission Lacks Jurisdiction Over Footnote 3

6. TDS sat on its right to have its Footnote 3 arguments heard by the Commission. Rather than seeking Commission reconsideration of its Footnote 3, TDS elected to appeal the La Star decision to the D.C. Circuit.

7. On July 10, 1992, TDS filed its Notice of Appeal with the Court under Section 402(a) of the Act, 47 U.S.C. § 402(a). See Telephone and Data Systems, Inc. v. FCC, No. 92-1291 (D.C. Cir. filed July 10, 1992). With the filing of the notice of appeal, jurisdiction over the Commission's La Star order, including Footnote 3, passed to the D.C. Circuit. See 47 U.S.C. § 402(c). Clearly, the Commission cannot modify its La Star decision while it is being reviewed by the Court. ^{7/}

8. The law of the D.C. Circuit is that once an appeal is

^{6/} See Petition, supra note 1, at 55.

^{7/} The D.C. Circuit has suggested that it would be "unseemly" for the Commission to modify an order under appeal without the Court's knowledge or permission. See McClatchy Broadcasting Co. v. FCC, 239 F.2d 19, 23 (D.C. Cir. 1956), cert. denied, 353 U.S. 918 (1957).

filed, the Commission has "no authority to conduct further proceedings without the court's approval." Greater Boston Television Corp. v. FCC, 463 F.2d 268, 283 (D.C. Cir. 1971), cert. denied, 406 U.S. 950 (1972). The Court "must order a remand if there is to be provision for further administrative consideration." See id. And the D.C. Circuit has ruled that it will not order a remand unless there has been a change in "core" circumstances that "goes to the very heart of the case". See id.

9. The only thing that has apparently changed since TDS took the La Star case to the D.C. Circuit in July 1992 is TDS' own view of the significance of Footnote 3. The fact that TDS woke up to the implications of Footnote 3 would not seem to justify a remand. Nevertheless, if it wants to adduce new evidence as to its candor, TDS should seek to have the La Star decision remanded from the D.C. Circuit. See, e.g., Massachusetts Bay Telecasters v. FCC, 261 F.2d 55, 67 (D.C. Cir. 1958).

10. If it agrees that the La Star matter should be reopened, the Commission is free to seek a remand from the Court. Regardless, the Commission cannot grant TDS the relief it requests. Unless and until the La Star decision is remanded, the Commission is without authority to revisit Footnote 3. 8/

8/ TDS suggests that the D.C. Circuit should be requested to hold the La Star appeal in "abeyance" while the Commission reconsiders Footnote 3. See Petition, supra note 1, at 6 n. 4. That suggestion puts the cart before the horse. The Court will normally hold an appeal in abeyance in cases where one party seeks judicial review while another timely files for Commission reconsideration. In such cases, the
(continued...)

11. There is no jurisdictional bar to instituting a new proceeding to address the broader issue of whether TDS should be disqualified as a cellular licensee. We will address that option next.

**B. New Evidence Conflicts With TDS' Claims
Concerning The 1988 La Star Application**

12. Potosi has no direct knowledge regarding the testimony that was given before Administrative Law Judge Sippel concerning the preparation of La Star's 1988 application for interim authority. Potosi's knowledge as to that testimony is limited to what it gleaned from the Petition. But it is clear to Potosi that the pleading did not disclose all the facts relevant to TDS' involvement in La Star's 1988 application.

13. The gist of TDS' claims is that it had no significant involvement in La Star's 1988 application. TDS represents that Mr. Nelson had very little personal involvement in La Star's day-to-day activities ^{9/}; that everything he did for La Star was at the request of Mr. Belendiuk ^{10/}; that TDS "did not independently initiate any La Star related action" ^{11/}; that TDS was only

^{8/} (...continued)

Commission retains jurisdiction and the Court holds the appeal in abeyance pending agency reconsideration. See Wrather-Alvarez Broadcasting, Inc. v. FCC, 248 F.2d 646, 649 (D.C. Cir. 1957). Here, the Court cannot defer to the Commission's jurisdiction and hold the La Star appeal in abeyance. The Commission is now without jurisdiction.

^{9/} See Petition, supra note 1, at 14-15.

^{10/} See id. at 15.

^{11/} See id. at 29.

involved in "insignificant and ministerial" matters relating to the 1988 La Star application 12/; that TDS "had no involvement in designing La Star's system" 13/; that its involvement in the 1988 La Star application was limited to three of the application's fifteen exhibits 14/; that what little "work" was done on the application was performed by Mr. Nelson's subordinates at the request of Mr. Belendiuk 15/; that TDS did not ask La Star's consultants to perform any tasks 16/; and that TDS was not "orchestrating and overseeing" Mr. Belendiuk's activities. 17/

14. Documents uncovered by Potosi cast serious doubt on all of TDS' claims.

15. The declaration of James H. Creekmore, Sr. is proffered at Tab 1 hereto. Attached to Mr. Creekmore's declaration are copies of the memos he made of the telephone conversations he had with Mr. Nelson, Mr. Belendiuk and Mark Peabody, who was apparently an engineer associated with Richard L. Biby, P.E. 18/ Those conversations related to La Star's efforts to obtain the cooperation of Cellular South, Inc. ("Cellular South") in La

12/ See Petition, supra note 1, at 33-34.

13/ See id. at 37.

14/ See id. at 39.

15/ See id. at 40.

16/ See id. at 41.

17/ See id. at 49.

18/ See infra Tab 1, at Exhibits 1 and 4.

Star's efforts to obtain interim operating authority. 19/

16. James Creekmore's records suggest that Mr. Nelson was personally involved in significant La Star matters, and that he personally "initiated" La Star actions. It was Mr. Nelson that called James Creekmore on October 23, 1987, and initiated negotiations on behalf of La Star to obtain Cellular South's consent to a 39 dbu contour extension into the Biloxi MSA. 20/ And it was Mr. Nelson that arranged for Mr. Creekmore to discuss the proposed 39 dbu extension with Mr. Peabody, one of La Star's engineering consultants. 21/

17. James Creekmore received a second telephone call from Mr. Nelson on February 9, 1988. During that conversation, Mr. Nelson advised Mr. Creekmore of La Star's interest in using Cellular South's switch. Mr. Nelson stated that he would "put [Mr. Belendiuk] in touch with" Mr. Creekmore. 22/

18. As Mr. Nelson promised, Mr. Belendiuk called James Creekmore later that same day. Mr. Belendiuk informed Mr. Creekmore of La Star's plans to seek interim operating authority. Mr. Belendiuk stated that La Star "wanted to operate off [the Cellular South] switch on an interim basis". 23/ He stated that

19/ Cellular South was (and still is) the licensee of the wireline cellular system in the Biloxi-Gulfport, Mississippi MSA. Cellular South subsequently changed its name to Mississippi Cellular Telephone Company.

20/ See infra Tab 1, at Exhibit 1.

21/ See id.

22/ See id. at Exhibit 2.

23/ See id. at Exhibit 3.

La Star "would need [Cellular South's] O.K. plus some frequency coordination from [its] engineers." 24/

19. During the February 9, 1988 conversation, Mr. Belendiuk identified Kit Crenshaw, John Brady and Pat Brady as the La Star "contracts" 25/ However, Mr. Creekmore never discussed the La Star matter with Mr. Crenshaw, John Brady or Pat Brady. 26/

20. James Creekmore had one more telephone conversation with Mr. Belendiuk on February 16, 1988. 27/ During that conversation, Mr. Belendiuk tried to get Mr. Creekmore and his brother, Wade H. Creekmore, Jr., to allow La Star to represent to the Commission that it would use the Cellular South switch, and that Cellular South consented to the 39 dbu contour extension. 28/

21. All these discussions led up to a telephone conference between Wade Creekmore and Mr. Belendiuk on February 17, 1988. Wade Creekmore's declaration and his memo of that critical conversation is attached at Tab 2 hereto.

22. In their February 17, 1988 conversation, Wade Creekmore and Mr. Belendiuk discussed what La Star could represent in its application for interim operating authority concerning the 39 dbu contour extension and the use of Cellular South's switch. 29/

24/ See infra Tab 1, at Exhibit 2.

25/ See id. at Exhibit 4.

26/ See id.

27/ See id. at Exhibit 5.

28/ See id.

29/ See infra Tab 2.

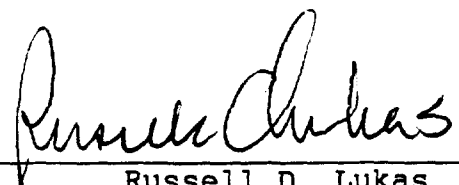
Mr. Belendiuk stated that he "would call Don Nelson for a decision". 30/

23. The records of the telephone conversations constitute probative, documentary evidence that suggest that Mr. Nelson was not only personally involved in significant La Star activities, but that he was capable of "orchestrating" the activities of La Star's consultants and, more importantly, its attorney. And Wade Creekmore's memorandum of his conversation with Mr. Belendiuk suggests that La Star's attorney considered Mr. Nelson to be a decision-maker.

24. In view of this new evidence, Potosi respectfully submits that the Commission would be justified in designating TDS for a evidentiary inquiry into its qualifications to be a licensee.

Respectfully submitted,

POTOSI COMPANY

By 

Russell D. Lukas
David L. Nace

Its Attorneys

Lukas, McGowan, Nace
& Gutierrez, Chartered
1819 H Street, N. W.
Seventh Floor
Washington, D. C. 20006
(202) 857-3500

30/ See infra Tab 2.

DECLARATION

I, JAMES H. CREEKMORE, SR., declare the following under penalties of perjury:

1. I am the president of Potosi Company. I am also an officer of Mississippi Cellular Telephone Company ("MCTC"), which was known as Cellular South, Inc. ("Cellular South") from October 1, 1987 until March 1991 when the name was changed. MCTC has been the licensee of the wireline cellular systems in the Biloxi-Gulfport and Pascagoula, Mississippi MSAs since 1988.

2. H. Donald Nelson is vice president of MCTC. Mr. Nelson is also president of United States Cellular Corporation.

3. On October 23, 1987, Mr. Nelson called and told me that Telephone and Data Systems, Inc. ("TDS") had acquired Maxcell's interest in an application to provide cellular service to the north New Orleans area. Mr. Nelson wanted Cellular South to consent to have a 39 dbu contour extension into the Biloxi-Gulfport MSA. He asked me to call an engineer by the name of Mark Peabody to discuss the proposed extension.

4. I have attached hereto as Exhibit 1 a copy of the notes that I took during the telephone conversations I had with Mr. Nelson and Mr. Peabody on October 23, 1987.

5. Mr. Nelson called me again on February 9, 1988. Mr. Nelson advised me that TDS and Lafourche Telephone Company ("Lafourche") were on the same side of litigation involving an application to provide cellular service to St. Tammany Parish, Louisiana. Mr. Nelson informed me that Arthur Belendiuk was their lawyer. He indicated that TDS and Lafourche wanted to use the Cellular South switch in the Biloxi-Gulfport MSA. I told Mr. Nelson that I would be happy to talk to Mr. Belendiuk about it. He said that he was going to put Mr. Belendiuk "in touch with us."

6. Exhibit 2 hereto is a copy of the notes that I took during the telephone conversation I had with Mr. Nelson on February 9, 1988.

7. Mr. Belendiuk called me later on February 9, 1988. He stated that he represented LaStar Cellular Telephone Company ("LaStar"), which was a partnership between TDS and Lafourche. Mr. Belendiuk stated that LaStar would be seeking interim operating authority to serve the north New Orleans area. He indicated that LaStar would like to operate using the Cellular South switch.

8. Mr. Belendiuk informed me that Kit Crenshaw would be the contact person for LaStar. He also said that John and Pat Brady could be contacted. To the best of my recollection, I never discussed LaStar's proposal with Mr. Crenshaw, John Brady or Pat Brady. I only discussed the matter with Don Nelson, Mark Peabody and Arthur Belendiuk.

9. Exhibit 3 hereto is a copy of the notes I made during my conversation with Mr. Belendiuk on February 9, 1988.

10. Exhibit 4 hereto is a copy of the facsimile I received from Richard L. Biby, P.E., concerning the proposed 39 dbu overlap into the Biloxi-Gulfport MSA.

11. On February 16, 1988, I had another telephone conversation with Mr. Belendiuk. My brother, Wade H. Creekmore, Jr., was also a part to the conversation. Mr. Belendiuk again stated that LaStar wanted to use the Cellular South switch in order to have a more believable application with the FCC and to save money. Mr. Belendiuk stated that LaStar wanted Cellular South to consent to the 39 dbu contour overlap. He assured us that LaStar was not interested in serving the Biloxi-Gulfport MSA.

12. Exhibit 5 hereto is a copy of the notes I made during the conversation with Mr. Belendiuk on February 16, 1988.

13. All of the foregoing facts are true, complete and correct to the best of my personal knowledge and belief, and are proffered in good faith.


James H. Creekmore, Sr.

Executed this 18th day of February, 1993.

10-23-87JC + Don Nelson

An issue in N.O. (n. of lake). In acquiring Alexandria, they got a piece of B. Roque + N. New Orleans. N. New Orleans is contingent on getting FCC approval vs. Bell South.

A plan (n. of the lake) - - 1 cell incurs ~~\$\$\$~~ 5-7% into Biloxi MSA. The engineer wants to talk to us (Peabody) Mark 703-522-5722. Dick Biby, engineering/consult firm. Communications Engineering Services, Arlington, Va

Two can file for it -- Maxcell (wireline) is what TDS group bought out.

Bell South filed for south of the lake. ~~The FCC~~ Didn't file north of the lake originally. Starr is majority, TDS has bought a piece of Starr's cellular interest. By virtue of this TDS got into N.O. Don asked me to call Peabody and talk to him about it.

I called Peabody right after talking to Don.

I called → Peabody : 2:30 P.M. La.

Filing amendment to Starr application. La-Starr reinstated (FCC will take a look at it). FCC is rescinding CGSA north of the lake, and will decide allowances again who gets it. application

La-Starr extends into Miss. They want us to say it is O.K. because it would be mutually beneficial, handoff, etc.

Filing is due Monday morning. I told him I wanted to talk to Wade first, and we'd call him Mond

They want to say US Cellular has an interest in Biloxi and this would help on handoff, etc.

5/10 min. later: I called him back and told him not to interpret anything I said as agreeing with their position because we were non-committal at this time. He said he understands.

2-9-88

J C & Don Nelson

H. Jammany Parish, La -- Lafourche Del.
In litigation with FCC. Lafourche + TDS on same side.
Arthur Belinduke wants to talk about the
possibility of tying into our switch.
This is the North New Orleans area.

Belinduke is FCC lawyer; knows Nace. It
sounds like the proponents are planning to propose
using our switch to the F.C.C.

I told Don we would be happy to talk
to Belinduke, so Don is going to put him in
touch with us.

2-9-88

JC + Arthur Belinduke

202-887-0600

Belinduke represents LaStar, a partnership between TDS + Lafourche.

They got a favorable hearing at Ct. of appeals. So its back to the FCC.

They are seeking an interim order to operate out of our switch.

Bell South has no valid license to serve the North New Orleans area. They do have a temporary authority.

Belinduke sees at least another visit to the Ct. of Appeals, so they are looking at maybe several more years. Thus they want to operate off our switch in this interim basis.

They are trying get a decision by Mar. 27, so they'll need to file before Feb. 27. In any case the FCC will have to act within the next few months. LaStar would like to get up w/in 60-120 days of an order.

They would need our O.K. plus some frequency coordination from our engineers.

Kit Crenshaw - La Fourche is contact man.
574-693-4567. (Attorney) John or Pat also.

Exhibit 4

RICHARD L. BIBY
COMMUNICATIONS ENGINEERING SERVICES, P. C.
1600 WILSON BOULEVARD
SUITE 1003
ARLINGTON, VIRGINIA 22209
(703) 522-5722

TELECOPIER COVER LETTER

DATE: February 16, 1988TOTAL NUMBER OF PAGES (INCLUDING COVER LETTER): 2TO: Mr. Jimmy Creekmore

COMPANY: _____

FROM: Richard L. Biby, P.E.RE: La Star Coverage and Extension into Biloxi-GulfportTELECOPIER PHONE NUMBER: 601-353-0950CLIENT/MATTER NUMBER: 113-01

COMMENTS: Dear Mr. Creekmore: Art Belendiuk has asked us to
send you the attached map by telefax. The solid contours
represent N.O.CGSA, Inc.s coverage of St. Tammany Parish, LA.
The dashed lines represent La Star's 39 dBu coverage plan
for an interim application. Also included, with dashed lines,
is the westernmost cell in the Biloxi-Gulfport wireline system.
We understand that Art Belendiuk will be in contact with you
tomorrow to discuss this material. Should you have any questions,
please contact us.

Sincerely yours,


Richard L. Biby, P.E.

cc: A. Belendiuk. Esa.

2-16-88North New OrleansJC+WC+Art Belinduke202-887-0600

La Star wants to say in FCC filing:

That we would have no objection to using our switch, for consideration, plus deminimus incursion into Mississippi so as to ~~have~~ have continuous coverage.

The reason for using our switch is
① to have a more believable application with the FCC and ② it would actually be cheaper.

Belinduke asks what concerns we have:

(1) Making SCB unhappy. Belinduke agrees that SCB would not be happy. However, he thinks they would see it as not a direct challenge; that we would be leasing the switch for consideration.

No Deminimus Intrusion -- They would like a bit of intrusion, but they are not interested in our area.

DECLARATION

I, WADE H. CREEKMORE, JR., declare the following under penalties of perjury:

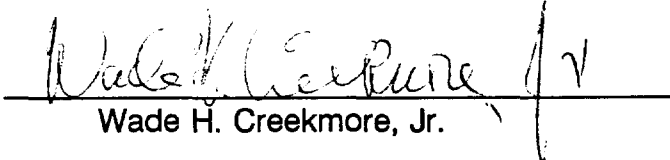
1. I am the secretary-treasurer of Potosi Company. I am also president of Mississippi Cellular Telephone Company ("MCTC"), which was known as Cellular South, Inc. ("Cellular South") in 1988. Since 1988, MCTC has been the licensee of the wireline cellular systems in the Biloxi-Gulfport and Pascagoula, Mississippi MSAs.

2. H. Donald Nelson is vice president of MCTC. Mr. Nelson is also president of United States Cellular Corporation.

3. In February 1988, I had two telephone conversations with Arthur Belendiuk, who represented LaStar Cellular Telephone Company ("LaStar"). Both conversations concerned an application LaStar was planning to file for interim operating authority to serve St. Tammany Parish, Louisiana. According to Mr. Belendiuk, LaStar was interested in utilizing Cellular South's switch. Mr. Belendiuk also wanted Cellular South to consent to allowing LaStar to propose a 39 dbu contour that extended into the Biloxi-Gulfport MSA.

4. I have attached hereto a copy of the notes that I made immediately after my telephone conversation with Mr. Belendiuk on February 17, 1988. As my notes indicate, Mr. Belendiuk told me that he was going to call Don Nelson for a decision as to the matters we had discussed.

5. All of the foregoing facts are true, complete and correct to the best of my personal knowledge and belief, and are proffered in good faith.


Wade H. Creekmore, Jr.

Executed this 17th day of February, 1993.

2-17-88

North New Orleans

W/C.P. - Art Belinduke

Called Art 9:50 AM and told him we were not willing to have anything in their application for interior North New Orleans service which would indicate in any way that we agree to La Star's use of our switch. That we are not willing to in any way to offend Bell South Mobility. He asked if there was a chance we might be willing to lease capacity on the Gulfport switch. I said that if we agreed on a price that we might. He asked if we planned to oppose their application. We discussed the diminutive incursions as shown on the map that he had faxed to us and I told him that I did not know of any reason to oppose them. Actually it appears that the Bell South incursion is more objectionable than the La Star. I also told him that if they put anything in the application that we don't like - that we would probably oppose it. He then said we understand each other very well and he would call Don Nelson for a decision. It was an amicable conversation. Don Nelson will probably call to discuss it and our position should probably be that this has nothing to do with Cellular South at this stage and that Cellular South has nothing to gain and could have something to lose - that we are not willing to help La Star.

CERTIFICATE OF SERVICE

I, Katherine A. Baer, secretary in the law offices of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 18th day of February, 1993, sent by first-class United States mail, copies of the foregoing OPPOSITION TO PETITION to the following:

*Cheryl A. Tritt, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N. W.
Room 500
Washington, D. C. 20554

*John M. Cimko, Jr., Esquire
Joseph Weber, Esquire
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N. W.
Room 644
Washington, D. C. 20554

Newton N. Minow, Esquire
Robert A. Beizer, Esquire
Sidley & Austin
1722 Eye Street
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Koteen & Naftalin
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& Quinn
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O'Connor and Hannan
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Kenneth E. Hardman, Esquire
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Washington, D. C. 20036

Arthur V. Belendiuk, Esquire
Smithwick & Belendiuk
2033 M Street, N. W.
Suite 207
Washington, D. C. 20036

A handwritten signature in cursive script, reading "Katherine A. Baer". The signature is written in dark ink and is positioned above a horizontal line.

Katherine A. Baer